

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

DOREEN JOSEPH,

Supreme Court No. 142615

Plaintiff-Appellee,

Court of Appeals No. 302508

v

L.C. No. 09-005726-CK

A.C.I.A.

Defendants-Appellant. /

**BRIEF OF INSURANCE INSTITUTE OF MICHIGAN AS AMICUS CURIAE
IN SUPPORT OF DEFENDANT-APPELLANT A.C.I.A.**

PROOF OF SERVICE



MARY MASSARON ROSS (P43885)
JOSEPHINE A. DELORENZO (P72170)
PLUNKETT COONEY
Attorneys for Amicus Curiae
Insurance Institute of Michigan
535 Griswold, Suite 2400
Detroit, MI 48226
Direct Dial: 313-983-4801

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STATEMENT OF APPELLATE JURISDICTION

On January 25, 2011, Macomb Circuit Court Judge Richard L. Caretti entered an order denying Defendant-Appellant A.C.I.A.'s motion for summary disposition, which sought to apply the one-year-back rule of MCL 500.3145(1). Defendant-Appellant filed an application for leave to appeal in the Michigan Court of Appeals on February 14, 2011, and, on February 15, 2011, filed a bypass application for leave to appeal to the Michigan Supreme Court. On May 20, 2011, the Supreme Court granted Defendant-Appellant leave to appeal prior to decision by the Court of Appeals. Accordingly, this Court has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF THE QUESTIONS PRESENTED

I.

Should this Court overrule *Regents of the Univ of Michigan v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010), and its nullification of the one-year back rule of MCL 500.3145 because *Regents* ignores principles of statutory interpretation, fails to recognize that a health care provider has an independent cause of action to recover benefits on behalf of a minor or incompetent, disregards the legislature's policy choices, and impedes the goals of the no-fault act?

Plaintiff-Appellee Doreen Joseph answers "No."

The Macomb County Circuit Court applied *Regents* as required.

Amicus Curiae the Insurance Institute of Michigan answers "Yes."

II.

Is this Court justified in overruling *Regents* notwithstanding the doctrine of stare decisis?

Plaintiff-Appellee Doreen Joseph would presumably answer "No."

The Macomb County Circuit Court applied *Regents* as required.

Amicus Curiae the Insurance Institute of Michigan answers "Yes."

STATEMENT OF INTEREST

The Insurance Institute of Michigan (the "Institute") is a non-profit Michigan corporation formed to serve the Michigan insurance industry and insurance consumers as a source of information and education regarding insurance issues for the media, the government, and the public. Its mission includes creating a greater public awareness of the insurance business and the benefits to the Michigan economy of a private, entrepreneurial insurance and risk management industry. The Institute advances its mission through educational and public relations programs, safety and loss prevention activities, strong press and media assistance to consumer programs, legislative and lobbying efforts, judicial and legal overview, and other activities that will promote an improved understanding of the purpose and principles of insurance and assist the public in addressing their business and personal needs. The Institute represents more than 90 property/casualty insurance companies and related organizations operating in Michigan.

This state's jurisprudence has recognized that the insurance industry is "affected with a public interest." *Attorney General v Michigan Surety Co*, 364 Mich 299, 325; 110 NW2d 677 (1961). The insurance industry has a strong interest in a proper interpretation of the statutes relating to no fault coverage. By overruling *Regents of the Univ of Mich v Titan Ins Co*, 487 Mich 289, 791 NW2d 897 (2010), which nullified the one-year-back rule of MCL 500.3145 and its limitation on damages recoverable in claims

made by minors/insane persons, the insurance industry can avoid stale claims, with all of their potential for fraud, unpredictable and long-tail recoveries, and related problems. If the one-year back rule is applied, the insurance industry can better predict losses and more efficiently provide coverage, and can pass along these efficiencies to policy holders in the form of lower premiums. That is in the interest of all. Since the costs of paying stale claims against an insurer are likely to be passed on to the rate-paying public, this matter bears revisiting, not only for the best rule to set the parameters of recovery of personal protection insurance benefits, but also to minimize unnecessary societal costs. This Court should reverse *Regents* and its flawed reasoning.

STATEMENT OF FACTS

Amicus curiae rely upon the statement of facts set forth in Defendant-Appellant A.C.I.A.'s brief on appeal.

ARGUMENT I

This Court Should Overrule *Regents Of The Univ Of Michigan V Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010) And Its Nullification Of The One-Year Back Rule Of MCL 500.3145 Because *Regents* Ignores Principles Of Statutory Interpretation, Fails To Recognize That A Health Care Provider Has An Independent Cause Of Action To Recover Benefits On Behalf Of A Minor Or Incompetent, Disregards The Legislature's Policy Choices, And Impedes The Goals Of The No-Fault Act.

This case presents this Court with the opportunity to overrule *Regents*, thereby reaffirming the Michigan Legislature's explicit limitation on recovery of personal protection insurance benefits under MCL 500.3145(1) of Michigan's No-Fault Act. In *Cameron v ACIA*, 476 Mich 55; 718 NW2d 784 (2006), overruled by *Regents*, 487 Mich 289, this Court held that the minority/insanity tolling provision of MCL 600.5851(1) does not toll the one-year-back rule permitting recovery of personal protection insurance benefits. As explained in *Cameron*, the plain language of MCL 600.5851(1) "does not pertain to the damages recoverable once an action has been brought," as does MCL 500.3145(1), but rather, it concerns the time under which a minor or person suffering from insanity may bring an action. *Cameron*, 476 Mich at 62. Unfortunately for the rule of law, the court in *Regents* ignored the plain language of the statutes at issue, erroneously concluding that:

[T]he approach in *Cameron* was flawed because it read the statutory language in isolation. MCL 600.5851(1) does

not create its own independent cause of action. It must be read together with the statute under which the plaintiff seeks to recover. In no-fault cases, for example, MCL 600.5851(1) must be read together with MCL 500.3145(1). Doing so, the statutes grant infants and incompetent persons one year after their disability is removed to “bring the action” “for recovery of personal protection insurance benefits ... for accidental bodily injury....” On the basis of its language, MCL 600.5851(1) supersedes all limitations in MCL 500.3145(1), including the one-year-back rule’s limitation on the period of recovery.¹ [*Regents*, 487 Mich at 298 (footnote added).]

Thus, the *Regents* Court held that “the ‘action’ and ‘claim’ preserved by MCL 600.5851(1) include the right to collect damages.” *Id.* at 299.

Amicus Curiae the Insurance Institute of Michigan submits that *Regents* was wrongly decided and should be overruled, with the holding and reasoning of *Cameron* reinstated in its place. *Cameron* adhered to well settled tenets of statutory interpretation by giving effect to the intent of the Legislature and its holding is supported by public policy considerations. Because *Regents* disregarded these principles, the Court should

¹ *Regents* further held that “this understanding of the interaction between the statutes is equally applicable to the interaction between MCL 600.5821(4) and MCL 500.3145(1).” *Regents*, 487 Mich at 302. MCL 600.5821(4) provides:

Actions brought in the name of the state of Michigan, the people of the state of Michigan, or any political subdivision of the state of Michigan, or in the name of any officer or otherwise for the benefit of the state of Michigan or any political subdivision of the state of Michigan for the recovery of the cost of maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions are not subject to the statute of limitations and may be brought at any time without limitation, the provisions of any statute notwithstanding.

restore the *Cameron* approach, which faithfully read the statutes to limit recovery to one year back.

A. Regents erred by finding that the tolling of the statute of limitations provided for in MCL 600.5851(1) affects the limitation on the amount of personal protection insurance benefits recoverable under MCL 500.3145(1).

In interpreting statutory language, courts must determine and give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The first step in ascertaining legislative intent is to look at the words of the statute itself. *World Architects & Engineers v Strat*, 474 Mich 223, 232; 713 NW2d 750 (2006). In *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 643 NW2d 553 (2002), this Court emphasized its obligation to enforce the statutory text as written by stating:

We may not read anything into the unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.... In other words, the role of the judiciary is not to engage in legislation.

Id., citing *Omni Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) and *Tyler v Livonia Public Schools*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999). Stated another way, “[t]he courts are not free to manipulate interpretations of statutes to accommodate their own views of the overall purpose of legislation.” *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 531; 676 NW2d 616 (2004).

Under these principles of statutory interpretation, the tolling of the statute of limitations contained in MCL 600.5851(1) does not trump the limitation on recovery of personal protection benefits embodied in MCL 500.3145(1). MCL 500.3145(1) provides:

An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [MCL 500.3145(1) (emphasis added).]

Thus, the Legislature limited recovery of personal protection benefits, excluding benefits for "the loss incurred more than 1 year before the date on which the action was commenced." MCL 500.3145(1).

On the other hand, MCL 600.5851(1) addresses the time in which minors and insane individuals must bring an action to recover benefits:

Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make entry or *bring the action* although the period of limitations has run. This section does not lessen the time provided for in section 5852. [MCL 600.5851(1) (emphasis added).]

Justice Markman's concurring opinion in *Cameron* cited *Howard v General Motors Corp*, 427 Mich 358; 399 NW2d 10 (1986) in which Justice Brickley discussed the distinction between a statute of limitations, that is, a limit on the time in which an action can be brought, and a limit on recovery of damages, which does not preclude the action or the ability to recover, but rather, limits an award once granted:

A statute of limitations "represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action." *Lothian v Detroit*, 41 Mich 160, 165; 324 NW2d 9 (1982).

* * *

Thus, relying on [this] very basic definition[] of statutes of limitations, the one- and two-year back rule statutes may not be so categorized. Simply stated, they are not statutes that limit the period of time in which claimant may file an action. Rather, they concern the time period for which compensation may be awarded once a determination of rights thereto has been made.

* * *

The [one- and two-year-back] rules do not perform the functions traditionally associated with statutes of limitations because they do not operate to cut off a claim, but merely limit the remedy

obtainable. They do not disallow the action or the recovery – a petition may be filed long after an injury and benefits may be awarded in response thereto – they merely limit the award once it has been granted.

Therefore, on the basis of the language of the rules, we perceive no logical reason for characterizing the one- and two-year back rules as statute of limitations. [*Id.* at 384-387 (emphasis added).]

Comparing MCL 500.3145(1) to MCL 600.5851(1) highlights this distinction between a statute of limitations and a limit on the recovery of damages. By its plain terms, MCL 500.3145(1) is a limit on the recovery of damages; it provides that “the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.” Nothing in that provision addresses the time period in which an action may be brought. Moreover, the statute does not provide any exception to the one-year-back limitation on damages. By contrast, §5851(1) clearly addresses a “period of limitations,” and specifies the time in which a minor or insane person can bring an action. Such persons, or those claiming under such persons, “shall have 1 year after the disability is removed through death or otherwise, to make entry or bring the action although the period of limitations has run.” Thus, in concluding that “the ‘action’ and ‘claim’ preserved by MCL 600.5851(1) include the right to collect damages,” *Regents*, 487 Mich at 299, *Regents* ignored the plain meaning of these statutes and disregarded the distinction between the statute of limitations and the limit on recovery of damages. Therefore, this Court should overrule *Regents*.

B. *Regents* failed to recognize that a health care provider has an independent cause of action to recover benefits for services rendered to a minor or incompetent.

In its zeal to overturn *Cameron* in order to ensure a plaintiff's right to recover damages incurred while under a disability, the *Regents* majority failed to recognize that health care providers, including family members of the insured, can bring an independent action to recover benefits for services that they provided to a minor or incompetent. Thus, a ready remedy exists, even during the time when infants or disabled persons may be unable to bring their own suit. Contrary to the *Regents* Court, this reading does not gut the remedy provided by the no-fault statute. The *Regents* Court hypothesized:

Consider, for example, the hypothetical case of a boy injured in a car accident at age 12 and fully recovered by age 15. Upon reaching 18, he retains an attorney to file suit to recover the costs associated with the treatment of his injuries, relying on MCL 600.5851(1). The defendant also retains counsel, who responds by filing a motion to dismiss, arguing that none of the plaintiff's damages are recoverable. The trial court parses the parties' filings and determines that none of the plaintiff's costs were incurred in the year before suit was filed.

Under *Cameron*, the plaintiff in this hypothetical case was indisputably entitled to file suit, because MCL 600.5851(1) preserved his right to do so. Yet *Cameron* gutted his suit of any practical worth because, under its interpretation of MCL 600.5851(1), the plaintiff had no chance to recover any damages. Thus, *the plaintiff was denied the legal recourse the Legislature provided him, which is, after reaching his majority, to recover the damages he incurred more than a year earlier.* [*Regents*, 487 Mich at 304-305 (emphasis added).]

Based on this erroneously conceived hypothetical, the *Regents* Court opined that “*Cameron’s* evisceration of the crux of a plaintiff’s claim—the potential to recover damages—effectively removed altogether the incentive to file suit as permitted by MCL 600.5851(1).” *Id.* at 305.

Aside from the fact that a claimant can recover for damages incurred one year back in addition to all damages incurred thereafter, the *Regents* Court ignored the fact that, pursuant to MCL 500.3112, those who provided the services for which the hypothetical plaintiff was indebted have their own independent cause of action to recover for services provided while the plaintiff was under a disability. MCL 500.3112 states in relevant part:

Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer’s liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, *the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order.* The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. . . . [MCL 500.3112 (emphasis added).]

In other words, health care providers have a right to receive payment from the insurance companies and the providers are not required to wait for the minor's or incompetent's disability to be removed before filing a claim.

The Court of Appeals has previously recognized the existence of an independent cause of action on the part of health care providers. In *Regents of Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 733; 650 NW2d 129 (2002), the defendant insurance companies argued that the plaintiffs, Regents of the University of Michigan, had only a derivative claim through the accident victim and thus the tolling of the statute of limitations in MCL 600.5821(4) did not apply. But the Court found that, while the plaintiffs "may have derivative claims, they also have direct claims for personal protection insurance benefits." *Id.* at 733, citing *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375; 554 NW2d 49 (1996); *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 585-586; 543 NW2d 42 (1995) (emphasis added).

Similarly, in *Lakeland Neurocare Centers v State Farm Mut Auto Ins Co ex rel Michigan Dept of State Assigned Claims Facility*, 250 Mich App 35, 36-37; 645 NW2d 59 (2002), the Court of Appeals affirmed the health care provider's right to enforce the penalty interest and attorney fee provisions of the no-fault act. *Id.* at 37. In that case, the plaintiff health care provider filed an action against the defendant no-fault insurer when the insurer denied the provider's "requests for payment for rehabilitation services rendered to Arthur Smith, [the] defendant's insured, who was a pedestrian injured in a

motor vehicle accident.” *Id.* at 36. After the insurance company denied the claim, the health care provider filed a motion for summary disposition and the insurance company was ordered to pay “the full amount of ‘reasonable charges for the medical services rendered by [the health care provider] to Smith, an amount totaling \$162,331.50.” *Id.* at 37. The health care provider then filed a motion for no-fault penalty interest pursuant to MCL 500.3142, and attorney fees pursuant to MCL 500.3148(1), which the trial court denied, on the ground that the provider was not entitled to no-fault penalties because it was not the injured party. *Id.* The Court of appeals reversed. In *Lakeland*, the insurance company did not dispute that the medical care provider had the legal right to bring an action for payment of medical services rendered to the insured, but rather, the insurance company merely disputed whether the medical care provider had the right to attempt enforcement of the penalty interest and attorney fee provisions. *Lakeland*, 250 Mich App at 37-38. The *Lakeland* Court’s reasoning is nevertheless instructive. The Court first reviewed the relevant no-fault statutes, including MCL 500.3112, which provides that benefits are “payable to or for the benefit of an injured person....” The Court thus concluded that, because the health care provider was entitled to direct payment for its services, it had the right to enforce the penalty interest provision, even though it was not the injured party. *Id.* at 38-39.

The Court similarly found that MCL 500.3148(1)² did not limit attorney fees to the injured person. *Id.* at 41.

It is true that there is contrary authority in the Court of Appeals. See *Geiger v Detroit Auto Inter-Ins Exch*, 114 Mich App 283, 288; 318 NW2d 833, 835 (1982) overruled by *Cameron*, 476 Mich 55 (“[E]ven if we view the right to recover PIP benefits for medical expenses incurred during an insured’s minority as a separate cause of action belonging to the injured minor’s parents, it is clear that the cause of action is derivative from the injured minor’s rights under the insurance policy and the no-fault act.”); *Hatcher v State Farm Mut Automobile Ins Co*, 269 Mich App 596, 600; 712 NW2d 744 (2006) (“The statute confers a cause of action on the injured party and does not create an independent cause of action for the party who is legally responsible for the injured party’s expenses.”).

Geiger, however, did not address a parent attempting to obtain payment for attendant care services, but rather, the parent in that case was attempting to recover, on behalf of the injured child, “medical expenses and lost wages incurred as a result of the injuries.” *Gieger*, 114 Mich App at 285. Furthermore, albeit in nonbinding opinions, the

² MCL 500.3148(1) provides: “An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney’s fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.”

Court of Appeals has more recently distinguished these earlier cases and reaffirmed its recognition of an independent cause of action. The *Lakeland* opinion was cited with approval in *Borgess Med Ctr v Resto*, 273 Mich App 558; 730 NW2d 738, 745 (2007), *aff'd*, opinion vacated 482 Mich 946 (2008), for the proposition that “a party providing benefits to an injured person entitled to no-fault benefits may make a direct claim against a no-fault insurer.” *Id.* at 569. *Borgess* observed that the *Lakeland* Court “based its holding on the language of the statutory provisions involved, not on the premise that a health-care provider stands in the shoes of the person injured in an automobile accident.” Thus, “the logical implication of *Lakeland* is that a health-care provider . . . that has furnished ‘reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation,’ MCL 500.3107(1)(a), has an independent cause of action against a no-fault carrier liable to provide no-fault benefits to the injured person, MCL 500. 3105.” *Id.* at 569-70 (emphasis added). The *Borgess* Court recognized the alleged conflict with *Hatcher*, but found *Hatcher* distinguishable, explaining that the plaintiff in *Hatcher* based her claim on being legally responsible for the injured person’s expenses, not “on having provided ‘reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation,’ MCL 500.3107(1)(a), for which defendant is legally liable.” *Id.* See also *Miller v Citizens Ins Co*, 288 Mich App 424, 435; 794 NW2d 622, 628-29 (2010), *app den* 488 Mich 1034

(2011) (“Under MCL 500.3112, each medical provider could have brought an action or intervened in this action against Citizens.”)

Regardless of any split in the Court of Appeals, however, this Court can look to the plain language of the statute and clarify that health care providers, including family members of insureds, can bring an independent action against an insurance company to receive benefits for services provided to the insured.

C. *Regents* ignored the legislature’s determination regarding the period of time for which a claimant may collect personal insurance benefits, a policy determination which this Court must respect.

In addition to ignoring the tenets of statutory interpretation while seeking to solve nonexistent problems, *Regents* failed to adhere to separation of powers principles, which require the judiciary to respect legislative policy choices such as those embodied in MCL 500.3145(1), as long as they pass constitutional muster. See Const 1963, Art 3, Sec 2; *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306, 327; 685 NW2d 221 (2004), quoting *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936) (“[T]he legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States.”) Thus, in accordance with the constitution’s separation of powers, this Court cannot “revise, amend, deconstruct, or ignore the Legislature’s product and still be true to [its] responsibilities that give [the court] only the judicial power.” *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98; 754 NW2d 259 (2008) (internal citation and

punctuation omitted). It must also be kept in mind that, “in our democracy, a legislature is free to make inefficacious or even unwise policy choices,” and therefore, “[t]he correction of these policy choices is not a judicial function. . . . Instead, the correction must be left to the people and the tools of democracy: the ‘ballot box, initiative, referendum, or constitutional amendment.’” *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102, 109 (1999).

MCL 500.3145 is part of Michigan’s no-fault act, which ensures that persons injured in auto accidents are compensated quickly and equitably for medical costs and lost income, and limits application of the tort liability law which, historically, operated too slowly. When it was enacted, the Legislature altered the time period under which an injured person may recover personal protection insurance benefits. *Osterhart v Detroit Auto Inter-Insurance Exchange*, 103 Mich App 143, 147; 302 NW2d 622 (1981). The Legislature has the power under our Constitution to abolish or modify nonvested, common-law rights and remedies. *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174, 183 (2004). Article 3, § 7 of the Michigan Constitution specifically provides:

The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

Moreover, “it logically follows that the Legislature can also take the less drastic step of leaving the cause of action intact, but limiting the damages recoverable for a particular cause of action” *Phillips*, 470 Mich at 430. Thus, in enacting MCL 500.3145(1), the

Legislature exercised its powers to make policy choices and decided to limit the period for recovery of personal protection insurance benefits to no more than one year before the date on which the action was commenced. Clearly then, the *Regents* Court violated separation of powers principles when it nullified the one-year-back rule of MCL 500.3145(1).

As a matter of public policy, overruling *Regents* will effectuate the purpose of the no-fault act, which, as intended by the legislature, is to afford comprehensive and cost-effective insurance for all. The one-year-back provision of MCL 500.3145(1) serves two important purposes. First, it requires claimants to pursue their claims in a timely manner. *Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 841-42; 325 NW2d 602 (1982). To this end, the no-fault act sanctions both insurers and claimants for untimely action. Specifically, MCL 500.3142(2) provides that insurers are subject to penalty interest if claims are not paid within thirty days of receipt of "reasonable proof of the fact and of the amount of loss sustained." Similarly, as has been discussed in detail in the preceding arguments, claimants are subject to a one-year-back limitation on their recovery of damages if they do not promptly pursue their rights. MCL 500.3145(1). The second and equally important purpose served by MCL 500.3145(1) is maintaining a fiscally viable no-fault system while keeping premiums at an affordable level. *Shavers v Attorney General*, 402 Mich 554, 596; 267 NW2d 72 (1978).

These purposes cannot be served if claimants are permitted to recover benefits for services rendered months, years, and decades beyond the one-year back limitation the Legislature imposed in §3145(1) of the no-fault act. This case is a prime example, as the insurance company has already paid out over \$4 million and the plaintiff seeks an additional recovery for 33 years of case management service fees. Should this Court affirm the elimination of the one-year back rule, more astronomical claims will be brought for nonpayment/underpayment of home attendant care. Even the “smaller” claims may amount to several hundred thousands of dollars. The upward pressure on premiums as a result of these old claims is clear. Not only must the public finance benefits payable now and in the future, it must also subsidize the payment of millions of dollars on claims which should have been asserted years or decades ago. Thus, the purpose of the statutory rule which Amicus Curiae Insurance Institute of Michigan is asking this Court to reaffirm – the one-year-back limitation on recovery enacted by our Legislature – cannot be meaningfully served unless it applies in all cases where personal protection insurance benefits are sought.

Further, overruling *Regents* and reaffirming the one-year back rule will decrease the number of home attendant care disputes. Under the no-fault act, attendant care benefits are recoverable in the event of personal injury from a motor vehicle accident. MCL 500.3107(1)(a). The statute does not require that home attendant care services be performed by trained medical personnel; in fact, these services may be performed by

family members. Arriving at an appropriate rate of pay for home attendant care involves considering the nature and extent of the services provided, the skill involved in properly rendering the services, and the rates charged for similar services in the area. *Manley v DAIIE*, 127 Mich App 444; 339 NW2d 205 (1983), *reversed in part*, 425 Mich 140 (1986).

It can be extremely difficult for underwriters to predict an appropriate amount of reserves in attendant care cases. Often, the claims are difficult to document and predict. Attendant care is a significant component of the Michigan Catastrophic Claims Association premium assessment, which is \$145.00 per insured vehicle through June 2012 (up from \$124.89 per insured vehicle through June 30, 2010) www.michigancatastrophic.com (last visited 08/03/11). A significant component of that amount is family attendant care. This premium will continue to increase exponentially if claimants, such as those in this case, are permitted to make home attendant care claims that should have been brought years ago.

Finally, requiring claimants to comply with the one-year back rule will not prejudice the majority. Medical care providers, including family members who undertake attendant care services, have an independent cause of action to protect their own right to receive payment. If they fail to bring an independent suit, and the injured or disabled person also waits months, years, and even decades before seeking recovery, the legislature intended to limit their recovery to damages from within one year from

when they commenced suit. This rule represents a policy declaration intended to avoid stale claims.

The Legislature weighed the massive impact on the no-fault system of allowing litigants to present claims years or even decades after expenses are incurred against the possible marginal loss of benefits in a few cases. It concluded that recovery on such claims is limited to no more than one year back, as provided for in MCL 500.3145(1). This Court disregarded this policy choice in *Regents*.

Thus, *Regents* should be overruled and an approach that is faithful to the statutory balance should be adopted.

ARGUMENT II

This Court Is Justified In Overruling *Regents* Notwithstanding The Doctrine Of Stare Decisis.

Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed. *Brown v Manistee Co Rd Com'n*, 452 Mich 354, 365; 550 NW2d 215 (1996), overruled on other grounds in *Rowland v Washtenaw County Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). In approaching any case, “[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *2000 Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633 (2010), quoting *Payne v Tenn*, 501 US 808, 827; 111 S Ct 2597; 115 LEd2d 720 (1991). Nevertheless, although stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law, it is not a mechanical formula of adherence to the latest decision. *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010). The doctrine of stare decisis “was never intended to perpetuate error” *Corl v Huron Castings, Inc*, 450 Mich 620; 544 NW2d 278 (1996). Moreover, a court is most justified in overruling an earlier case where, as in the case at bar, a prior court misconstrued a statute. *Mudel v Great Atl & Pac Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000).

In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 207 (2000), this Court established a test for determining whether it should depart from stare decisis.³ Its analysis focused on the effects of overruling a wrongly decided precedent, particularly the effect on reliance interests and whether overruling the decision would work an undue hardship. *Robinson*, 462 Mich at 466.

In *Robinson*, the Court instructed that “stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes.” *Robinson*, 462 Mich at 463. It should be kept in mind that “that stare decisis is a ‘principle of policy’ rather than ‘an inexorable command,’ and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned.” *Id.* at 464. Accordingly, a court must first examine whether the earlier decision was wrongly decided. *Id.* at 462. If so, it then evaluates whether it is appropriate to overrule the decision by examining “the effects of overruling it, including most importantly the effect on reliance interests and whether that overruling would work an undue hardship because of that reliance.” *Id.* at 466.

³ In the lead opinion in *Petersen v Magna Corp, et al*, 484 Mich 300, 314; 773 NW2d 564 (2009), then-Chief Justice Marilyn Kelly departed from this test and introduced several new factors to consider. Recent case law nevertheless affirms that the *Robinson* test is the proper test to apply. See *People v Breidenbach*, 489 Mich 1, 15; 798 NW2d 738 (2011) (“In *Robinson v Detroit*, we set forth a multifaceted test that this Court applies before overruling a precedent in order to provide respectful consideration to the cases decided by our predecessors.”)

In this case, with respect to the threshold question of whether the earlier decision was wrongly decided, Amicus Curiae reiterates that *Regents* was wrongly decided because it disregarded the plain meaning of the statutes at issue. Thus, undue hardship will result only if *Regents* is allowed to stand. Further, when considering the reliance interest, “the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *Robinson*, 462 Mich at 466. *Regents* is a very recent decision that has not had a chance to become so embedded and accepted that to overrule it would turn the world upside down.

More importantly, when considering a statutory issue, such as in this case, “it is to the words of the statute itself that a citizen first looks for guidance in directing his action. *This is the essence of the rule of law*: to know in advance what the rules of society are.” *Robinson*, 462 Mich at 467 (emphasis added). Thus, a court should not “confound those legitimate citizen expectations by misreading or misconstruing a statute” because to do so will disrupt the reliance interest. *Id.* When, as here, a past court has misread or misconstrued a statute, a subsequent court should overrule the earlier court’s misconstruction because the past court

in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts

have no legitimacy in overruling or nullifying the people's representatives. [*Id.*]

In this case, as provided for in the no-fault act, third parties could have protected themselves by bringing suits, but the effect of *Regents* was to foist huge and unpredictable long-tail claims onto no fault insurers. Accordingly, this Court should reaffirm the one-year back rule in MCL 500.3145(1) and hold that it limits recovery as the Legislature intended.

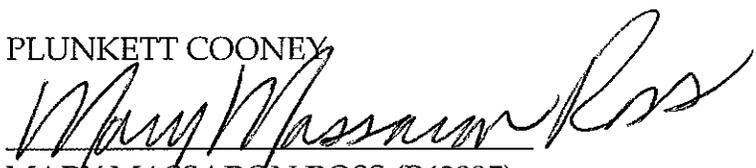
RELIEF

WHEREFORE, Amicus Curiae Insurance Institute of Michigan respectfully requests that this Honorable Court reverse the trial court in this case, overrule *Regents*, and grant such other relief as is proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

BY:


MARY MASSARON ROSS (P43885)
JOSEPHINE A. DELORENZO (P72170)
Attorney for Amicus Curiae Insurance
Institute of Michigan
535 Griswold, Suite 2400
Detroit, MI 48226
Direct Dial: (313) 983-4801

DATED: November 1, 2011

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

DOREEN JOSEPH,

Plaintiff-Appellee,

v

A.C.I.A.

Defendants-Appellant. _____/

Supreme Court No. 142615

Court of Appeals No. 302508

L.C. No. 09-005726-CK

PROOF OF SERVICE

MARJORIE E. RENAUD, states that on November 1, 2011, two (2) copies of Brief of Insurance Institute of Michigan as Amicus Curiae in Support of Defendant-Appellant A.C.I.A., together with Proof of Service, was served on:

Thomas A. Biscup, Esq.
45581 Village Blvd
Shelby Township, MI 48315

James G. Gross, Esq.
615 Griswold
Suite 1305
Detroit, MI 48226

by depositing same in the United States Mail with postage fully prepaid.

